Filed 4/2/12 P. v. Baul CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOEL BAUL,<br><br>Defendant and Appellant. | B225051<br><br>(Los Angeles County<br>Super. Ct. No. LA063524) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Herscovitz, Judge. Affirmed as modified with directions.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

_____

A jury convicted appellant Joel Baul of carjacking (Pen. Code, § 215, subd. (a))[1] (count 1); two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) (counts 2 & 5); assault with intent to commit rape (§ 220, subd. (a)) (count 3); and attempted robbery (§§ 664, 211) (count 4). With respect to counts 1, 3 and 4, the jury found that appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). The jury also found true the allegations that appellant had suffered three prior prison term convictions within the meaning of section 667.5, subdivision (b), that he had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a), and that he had suffered six prior serious or violent felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)).

The trial court sentenced appellant to state prison for a total of 119 years to life as a third-strike defendant. In count 1 (carjacking), the trial court imposed the high term of nine years tripled, or 27 years, with a one-year enhancement for knife use, 10 years for two 5-year priors, and three years for three 1-year priors for a total of 41 years to life in count 1. In count 3 (assault with intent to commit rape), the trial court imposed a consecutive term of 25 years to life with one year for knife use, 10 years for two 5-year priors, and three years for three 1-year priors for a total of 39 years to life in count 3. In count 4 (attempted robbery), the trial court imposed a consecutive term of 25 years to life, with one year for knife use, 10 years for two 5-year priors, and three years for three 1-year priors for a total of 39 years to life in count 4. The trial court stayed sentences of 38 years to life in counts 2 and 5 under section 654.

Appellant appeals on the grounds that: (1) he was deprived of his constitutional right to self-representation; (2) there was insufficient evidence to support the jury's verdict in count 3; (3) the trial court erroneously denied new counsel a copy of the trial transcript to prepare a defense for postconviction and sentencing proceedings; (4)

---

[1] All further references to statutes are to the Penal Code unless stated otherwise.

appellant is entitled to per se reversal of his sentence because he was completely denied the assistance of counsel during his sentencing hearing; and (5) two of the one-year prison prior enhancements imposed in counts 1 through 5 should be stricken because the prior convictions for these prison priors were used to enhance appellant's sentence under section 667, subdivision (a)(1).

## FACTS

### Prosecution Evidence

#### *A. Counts 1 & 2*

On February 18, 2009, at approximately 7:30 p.m., Jasmine Irving drove into the underground parking garage of her apartment building on Vanowen Street in Canoga Park. She parked in her assigned space and got out of the car to fix a light inside the car in the backseat area. A man, later identified as appellant, came from behind and put a knife to her throat and held her. He pushed her inside the backseat with his body and closed the car door. He told her to be quiet and not to scream. He then choked her with both hands. She could not breathe and believed she was going to pass out. He tied her hands behind her back. Appellant put Irving on the floor in a crouching position, moved up to the driver's seat, and started the car. He began backing up and leaving the parking lot. Irving asked appellant if he wanted her car or money and told him to take everything. Appellant said he wanted money and Irving told him to take it. Her purse was in the front passenger seat. However, appellant just started driving the car. Irving managed to untie one of her hands, opened the back door, and jumped out of the car when appellant stopped at a stop sign. Irving ran to a gas station as appellant drove off with her car with her purse inside.

Irving called the police and reported what had happened. Irving's car and her purse were recovered later the same day in the parking lot of a Home Depot store that was less than a mile away. The police returned Irving's purse but retained custody of the car to search for evidence. Irving's pink slip for the car and $400 cash were missing

when she got her purse back. Irving was unable to identify anyone in a six-pack photographic lineup and a live lineup.

***B. Counts 3, 4, & 5***

On March 5, 2009, at some time before 7:00 p.m., A.K. drove into the gated parking area of her condominium building on Sherman Way in the San Fernando Valley. The parking garage was under the building and protected by a sliding iron gate. She parked her car in her parking spot. As she was texting a friend while seated in the driver's seat, the rear passenger door opened and a man later identified as appellant got into the backseat. Appellant grabbed A.K.'s hair and pushed her head to the side, almost to the passenger seat. He held a knife to her left cheek underneath her ear and told her to move to the passenger seat. Appellant said, "Just shut up," "Be quiet," and "Just move." A.K. took the key from the ignition and moved to the passenger seat. Appellant kept telling her to be quiet. Appellant moved to the driver's seat. He smelled of alcohol. Appellant asked A.K. personal questions, such as her name, her marital status, whether she had any children or a boyfriend, if she lived alone, and what her job was. Appellant took the keys from her. He told her to take her shoelace from her shoe. A.K. took off her shoe and removed the shoelace.

A.K. noticed that appellant wore gloves with the finger portion cut off. Appellant tried to tie her hands behind her back with the shoelace but could not. A.K. kept talking and trying to raise her head to see appellant and he told her several times to just shut up. Appellant told her that if she did not shut up he would hurt her. Appellant tried to use A.K.'s keys to start the car, but he could not figure out how they worked and began swearing. Appellant put the shoelace around A.K.'s neck at one point, and she managed to move her right hand and place it between the shoelace and her neck. Appellant also told A.K. to take off her pants. She refused.

A.K.'s car alarm went off twice as appellant tried to start the car. The first time, appellant pushed A.K.'s head down and told her to just shut up. When it went off the second time, A.K. managed to get free and get out of the car. She ran from the car to her

neighbor, Dmitry Voznenko, who was nearby. She told him that there was a man in her car trying to kill her. Voznenko had heard a terrible scream and had seen two silhouettes in her car. He saw A.K. get out of her car without shoes and with a shoelace on her neck.

Appellant eventually got out of the driver's seat and headed toward A.K. and Voznenko while holding something in his right hand. Voznenko put A.K. behind his back, and appellant stared at them for around 10 seconds. When another neighbor, Starling Jenkins, opened the gate to the parking area, appellant left. A.K. yelled that he had her keys and appellant threw them down to the side. Voznenko called 911. Jenkins saw a hooded figure walking away "aggressively." Jenkins followed appellant on foot. Appellant headed west, up an alley, until he reached a bicycle chained to a pole. Jenkins then went to get his truck to follow appellant, but he lost track of him.

The police arrived shortly thereafter and talked to everyone about what had happened. A.K. was shown a six-pack photographic lineup but was unable to identify anyone.

***C. Sex Offender Registration Evidence***

Brent Epstein is a parole agent employed by the Department of Corrections. He supervises registered sex offenders within the San Fernando Valley, and he supervised appellant from January 12, 2009, through March 13, 2009, the date of appellant's arrest. Appellant wore a GPS device to monitor his movements. The device results in red dots on a grid on a computer screen that indicate whether the parolee is moving or standing still. The dots also show the pace of movement, i.e., whether the person is walking, on a bike, or in a car. The device is tamper-resistant.

During March 2009, at the request of law enforcement, Parole Agent Steve Reinhart performed a crime scene correlation with the tracking data on appellant's monitoring device. The monitoring bracelet can lose its signal when underground or under buildings. Reinhart used appellant's GPS monitoring bracelet to track his location on February 18, 2009, between 7:00 p.m. and 9:00 p.m. Reinhart found that appellant had been lingering near Irving's apartment complex at 7:05 p.m. There was also a 30-

minute lapse in tracking between 7:12 p.m. and 7:58 p.m. The 7:12 p.m. signal was directly at the entrance to the underground parking structure. From 7:58 p.m. to 8:08 p.m., the tracking device showed appellant had gone to the Home Depot parking lot. He then left the Home Depot parking lot on foot. At 8:23 p.m., the GPS monitor showed appellant was back at his residence.

Reinhart also tracked appellant's location for March 5, 2009, between 5:45 p.m. and 7:45 p.m. He discovered appellant was in the vicinity of an alley near the parking garage for a complex near Sherman Way. He was moving back and forth in the alley. At 7:17 he was at the entrance to the underground parking structure of an address on Sherman Way that was A.K.'s address. From 7:17 p.m. to 7:30 p.m., the monitoring bracelet did not receive a signal. Reinhart discovered several other instances in the month of February and March where it appeared that appellant was lingering outside apartment complexes— areas that had underground parking structures—during the period between 6:00 p.m. and 8:00 p.m.

***D. Other Crime Evidence***

On July 8, 1990, F.M. arrived home at her apartment complex in Los Angeles at approximately midnight. She drove into the parking garage under the building and parked her car. F.M. got out of her car and noticed a man standing near the entry door to the building. The man, later identified as appellant, was standing against the wall with a knife in his hand. Before F.M. could react, appellant grabbed her with his left arm and began squeezing her. He put the knife to F.M.'s neck, and said, "Shut up or I'm going to kill you." Appellant tried to move F.M. to a corner of the parking garage and they struggled. F.M. was cut on her thumb and index finger. Appellant pulled her behind her car and made her sit on the ground. He put tape over her mouth and took some of her jewelry. She tried to talk and he said, "Don't talk or I'm going to kill you." Appellant had F.M. pull her sweater over her head, and then he removed her pants and underwear. Appellant then raped F.M. He also inserted his fingers into her vagina. At some point

after the assault, appellant left. A piece of her jewelry was later found on appellant. She identified appellant in a preliminary hearing.

**Defense Evidence**

Appellant presented no evidence or testimony in his defense.

## DISCUSSION

### I. Denial of *Faretta* Motion

#### *A. Appellant's Argument*

Appellant contends the trial court abused its discretion in denying his motion under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), since his legitimate interest in representing himself was supported by consideration of the factors set out in *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*). A short continuance for appellant to prepare would not have disrupted or significantly delayed the proceedings. Moreover, his *Faretta* motion was made on the morning of trial and was not untimely, since it was made at the defendant's earliest opportunity. The record shows that appellant was not misusing the *Faretta* motion to unjustifiably delay the trial or to obstruct the orderly administration of justice.

#### *B. Relevant Authority*

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. (*Faretta v. California* [1975] 422 U.S. 806, 819 . . . .)" (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) The erroneous denial of a timely *Faretta* request is reversible per se. (*People v. Butler* (2009) 47 Cal.4th 814, 824.) An erroneous denial of an *untimely Faretta* motion, however, is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.)

The right of self-representation is not self-executing. Rather, the defendant must make a knowing, voluntary and unequivocal assertion of the right "within a reasonable time prior to the commencement of trial." (*Windham, supra,* 19 Cal.3d at pp. 127-128, fn. omitted.) The timeliness requirement is to preclude a defendant from misusing the motion to unjustifiably postpone trial or frustrate the orderly administration of justice. (*Id*. at p. 128, fn. 5.)

In California, there is no bright-line test for determining the timeliness of a *Faretta* motion. (*People v. Clark* (1992) 3 Cal.4th 41, 99.) The *Windham* court noted that "a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court." (*Windham, supra,* 19 Cal.3d at p. 128, fn. 5.) Consequently, courts have held that *Faretta* motions accompanied by a request for continuance were untimely when made shortly before commencement of trial, subject to the court's discretion. (See, e.g., *People v. Burton* (1989) 48 Cal.3d 843, 853.)

To insure an adequate record, the trial court should inquire *sua sponte* into the factors underlying the request. (*Windham, supra,* 19 Cal.3d at p. 128.) In assessing an untimely *Faretta* motion, "'[t]he court should consider such factors as the "'quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" [Citation.]' [Citation.]" (*People v. Clark* (1992) 3 Cal.4th 41, 98-99, citing *Windham,* at p. 128; *People v. Marshall* (1996) 13 Cal.4th 799, 827.)

***C. Proceedings Below***

On February 22, 2010, the case was called for trial, and the trial court informed the parties that 70 jurors were on their way. Appellant waived his right to wear civilian clothing, stating that he was under the impression that the trial was going to be postponed

to a later date. Appellant told the court that he had been studying, and he understood that he had a *Faretta* right. He preferred "to do that" because he did not believe his attorney, Mr. Budde, had his best interests at heart. When asked if he was ready for trial, appellant replied, "No, I'm not ready for my trial for today. I haven't had access to a legal law library." Appellant told the court that he was illiterate to the law and it might take him a month or so to come up to speed.

When the trial court pointed out that the information had been filed on December 7, 2009, appellant said he had tried to talk to the court on February 18, 2010, but he was not allowed to come in the courtroom. When asked again how long he would need to be ready, appellant said he did not know the exact amount of time, but that, tentatively, it would not take long. He would inform the trial court when he was ready to proceed. It would be perhaps a month, but perhaps less because he was "very intelligent" and could read and retain information very well.

The trial court told appellant that his request was not timely, since it was made on the day set for trial with a panel of 70 jurors having been summoned to hear his case. The court stated "[i]t would be a perversion of justice to delay your trial when you made such a late request to represent yourself." The court added that it was concerned that appellant was asking the court to represent himself merely for the purpose of obstruction or delay.

Appellant then complained to the court about motions that he wanted to be filed that had not been filed by Mr. Budde. In addition, Mr. Budde had said it was not a good idea to subpoena certain items that appellant wanted to have subpoenaed. Appellant wanted the call sheets of the GPS monitors in order to show that he frequented the crime locations and the Home Depot on more than one occasion. Mr. Budde had told him that this information was not relevant. The district attorney confirmed to the court that the GPS records would confirm what appellant said, and she added that this was not an issue. Appellant then stated that he did not feel confident in his attorney because he had told appellant that he was going to prison.

When asked by the court, Mr. Budde said he had tried hundreds of cases. He denied telling appellant that he was going to prison. The trial court then informed appellant that he was not eligible for probation in any event. Appellant reiterated that he and his family were not comfortable dealing with his attorney. Appellant clarified, however, that he was seeking to represent himself and not appointment of a different attorney.

The trial court respectfully denied appellant's motion stating, "I feel . . . requesting this today, with the jury panel on their way over here—and even if it was done last week, late last week, when you were last in court and not brought into the courtroom, where Mr. Budde announced ready on your behalf, that was not timely." Appellant replied, "So it is on the record that I was denied pro per?" The trial court stated that it was. Appellant replied, "Thank you."

***D. Motion Properly Denied***

We conclude appellant's *Faretta* motion was untimely, having been made on the day of trial and just before the start of jury selection. At this point, appellant's right of self-representation was no longer absolute, but subject to the court's discretion. "When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]" (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398 (*Howze*).)

Although the trial court here may not have expressly considered each of the *Windham* factors, an express statement is not mandatory. (*Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) The record reflects that the trial court implicitly considered many, if not all, of these factors. (See *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) The record indicates that the trial court inquired as to the extent of Mr. Budde's experience and learned that he had tried hundreds of criminal trials. The trial court also learned that appellant's problems with his counsel consisted of disagreements over tactics, which is

not a sufficient reason for granting an untimely *Faretta* request. (*People v. Wilkins* (1990) 225 Cal.App.3d 299, 309, fn. 4; see also *People v. Scott*, at p. 1206.) The trial court observed that the information had been filed on December 7, 2009. The record shows that appellant had been in court on January 12, 2010, well over a month after that, and had not made a *Faretta* motion. The trial court also noted that, although appellant claimed he was not allowed to make a motion on February 18, any such motion would also have been untimely, since it was the eve of trial. Appellant said that he was not sure when he would be ready for trial and told the court he would let the court know, since he was "illiterate to the law." Clearly the trial court considered such a delay a disruption in the orderly process of justice, since the jurors were on their way, and everyone had announced ready for trial.

In *Howze*, for example, the defendant claimed that his *Faretta* motion was timely because it was made two days before trial and was *not* accompanied by a request for a continuance. (*Howze*, *supra*, 85 Cal.App.4th at pp. 1396-1397.) The *Howze* court concluded "the decision whether to grant self-representation status to a defendant is discretionary when the motion is made within days of the trial date. . . ." (*Id*. at p. 1397.) Under the circumstances present in this case, where appellant made his motion on the very day of trial while seeking an *indefinite* continuance, we conclude that the trial court did not abuse its discretion when it denied appellant's *Faretta* motion. In *People v. Ruiz* (1983) 142 Cal.App.3d 780, 789-791, for example, the court stated that a *Faretta* motion made six days before trial was untimely and subject to the trial court's discretion.

Moreover, even if the denial of a continuance were erroneous, appellant suffered no prejudice. Denial of an untimely *Faretta* motion does not require reversal per se, but is subject to the "'harmless error'" test of *Watson*, *supra*, 46 Cal.2d 818. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) In that case, the court noted that in light of the subsequent proceedings and the fact that a pro se defendant never improves his situation or achieves a better result than a trained professional, any error was harmless. In the instant case, given the overwhelming evidence of appellant's guilt, it is not

reasonably probable the outcome of the trial would have been more favorable to appellant had he been granted a continuance to prepare his own defense. (*Watson*, at p. 836.)

## II. Sufficiency of the Evidence in Count 3

### *A. Appellant's Argument*

Appellant contends the jury's guilty verdict in count 3 cannot stand because there was no evidence of appellant's intent to commit rape. The testimony established only that A.K.'s attacker's intent was to kill her or seriously harm her with a knife. Her testimony did not establish that he asked her to take off her pants, and her pants never came off.

### *B. Relevant Authority*

In reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment, presuming in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Proctor* (1992) 4 Cal.4th 499, 528.) Given this court's limited role on appeal, appellant bears an enormous burden in claiming there was insufficient evidence to sustain the verdict. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Although a reviewing court "may not 'go beyond inference and into the realm of speculation in order to find support for a judgment'" (*People v. Memro* (1985) 38 Cal.3d 658, 695, disapproved on another point in *People v. Gaines* (2009) 46 Cal.4th 172, 181), "[i]f the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Reversal for insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard of review is the same in cases where the prosecution relies

primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

***C. Proceedings Below***

To demonstrate the insufficiency of the evidence of assault with intent to commit rape, appellant cites the following exchange on direct examination of A.K.

"Q. . . . Did he ask you to take any other items of your clothing off?

"A. No. No.

"Q. Do you remember if he asked you to take your pants off?

"A. Yeah, I did, but—yeah, I did.

"Q. Okay. Did he ask you to take your pants off?

"A. I think he wanted to take the string, probably, off the pants."

***D. Evidence Sufficient***

In count 3, appellant was charged under section 220, subdivision (a), with assault with intent to commit a felony; specifically, with the intent to commit rape. To convict appellant of this crime, the People had to show that he intended to engage in sexual intercourse with A.K. and to use force to overcome her resistance. (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597 (*Craig*), citing *People v. Nye* (1951) 38 Cal.2d 34, 37.) The specific intent with which an act is committed may be shown by the conduct of the defendant and the circumstances surrounding the commission of the act. (*People v. Bradley* (1993) 15 Cal.App.4th 1144, 1154.)

We conclude the evidence was sufficient to show that appellant had the specific intent to commit the rape of A.K. In *Craig, supra*, 25 Cal.App.4th 1593, as in this case, "the entire mélange of circumstances," including evidence of two similar acts by the defendant, led to the conclusion that a reasonable trier of fact could infer that appellant assaulted the victim with the specific intent of committing rape. (*Id.* at p. 1604.) Although other reasonable inferences could have been drawn, it was up to the jury to draw them. (*Ibid.*)

At the outset, the record shows that A.K. was obviously nervous, and at first answered "No" to the prosecutor's question, "Did he ask you to take any other items of your clothing off?" A.K. continually interrupted the prosecutor's questions and gave nonresponsive answers. When the prosecutor succeeded in momentarily slowing down A.K., the prosecutor asked, "Did he ask you to take off your pants?" A.K. answered, "Yes." A.K. did not recall telling police officers that appellant told her to take off her pants and that she refused. She acknowledged that she tried not to remember what happened, and for that reason she remembered it better right after it occurred. Officer Vincent Allard testified that A.K. told him that appellant told her to take off her pants while holding a two-inch chrome knife to the left side of her face. She told Officer Allard that she refused to comply. It was reasonable to infer that appellant told A.K. to take off her pants while holding a knife to her cheek for the purpose of raping her in the garage (or perhaps elsewhere) as he had done before.

Moreover, appellant did not ask for any money and expressed little interest in money as he was tying up A.K. A.K. herself stated she knew appellant was going to "tie [her] down" and drive her away because he did not want any money or jewelry. This fact, along with the other evidence, leads to a reasonable inference that appellant's intent was to commit rape. (See *People v. Dobson* (1970) 12 Cal.App.3d 1177, 1180-1181 [fact that assailant did not attempt to steal victim's purse or any other property was a circumstance that supported conclusion that his intent was to commit rape]; *People v. Collier* (1952) 113 Cal.App.2d 861, 868 [fact that victim's attacker did not ask her for money was a circumstance justifying the inference that rape was intended].)

Significantly, as in the *Craig* case, the jury also had before it evidence of appellant's similar conduct on a prior occasion, conduct that culminated in the rape of the prior victim. (See *Craig, supra,* 25 Cal.App.4th at pp. 1596-1597.) Indeed, the circumstances of the prior crime were strikingly similar. The jury's consideration of appellant's rape of F.M. as circumstantial evidence of his intent with A.K. was not improper. (Evid. Code, § 1108; see *People v. Maury* (2003) 30 Cal.4th 342, 399-400;

*People v. Jones* (1997) 58 Cal.App.4th 693, 718; *People v. Rehmeyer* 19 Cal.App.4th 1758, 1765-1766; *People v. Poon* (1981) 125 Cal.App.3d 55, 82.)

The trial court gave the jury instructions on the lesser included offense of assault in count 3, and the jury rejected this alternative. (CALCRIM Nos. 3517, 915.) Considering the totality of the circumstances in this case, we conclude that a rational trier of fact could have concluded beyond a reasonable doubt that appellant committed the assault of A.K. with the required specific intent.

**III. Denial of Trial Transcript to New Counsel**

***A. Appellant's Argument***

Appellant contends that the attorney who represented him at sentencing, after his trial counsel became medically unavailable, was not able to provide effective assistance of counsel, since the trial court denied new counsel's request for trial transcripts. Appellant's new counsel was not present during trial, and former counsel was medically unavailable for consultation. Citing *People v. Hosner* (1975) 15 Cal.3d 60 (*Hosner*), appellant argues that the erroneous denial of an indigent defendant's motion for a free transcript requires automatic reversal.

***B. Relevant Authority***

An indigent criminal defendant must be provided a free transcript of prior proceedings where the transcript is necessary for an effective defense or appeal. (*Hosner*, *supra*, 15 Cal.3d at p. 64.) However, "an indigent defendant is not entitled, as a matter of absolute right, to a full reporter's transcript of his trial proceedings for his lawyer's use in connection with a motion for a new trial; but, since a motion for a new trial is an integral part of the trial itself, a full reporter's transcript must be furnished to all defendants, rich or poor, whenever necessary for effective representation by counsel at that important stage of the proceeding." (*People v. Lopez* (1969) 1 Cal.App.3d 78, 83.) Whether the denial of transcripts for a motion for new trial is so arbitrary as to violate due process must be determined on a case by case basis. (*Ibid*.) Two factors relevant to the determination of the need for transcripts are the value of the transcript to the defendant in

connection with the proceeding for which it is sought, and the availability of alternatives that would fulfill the same functions as a transcript. (*Hosner*, at p. 65.) The trial court therefore may deny a motion for free transcripts for use in preparing a motion for new trial where the defendant fails to show a particularized need for the transcripts in order to decide an issue presented. (*People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1702.)

***C. Proceedings Below***

On May 26, 2010, the date set for sentencing, a different public defender, Bradley Siegel, appeared for appellant. Mr. Siegel announced that the defense was not ready for sentencing, stating, "The court is aware that I've sought transcripts of this trial. I was not trial counsel. I know very little to nothing of this matter. I cannot make a determination, in the absence of transcripts, whether or not there are valid motions to submit to this court." He added that he had no information relevant to making a motion under *Romero*[2] or for concurrent time to any of the charges. He argued that to proceed would be to deny appellant effective representation of counsel in violation of the Fifth, Sixth, and Fourteenth amendments. Since it appeared the court was not going to generate transcripts, Mr. Siegel requested that sentencing be continued until Mr. Budde could be before the court. He requested a continuance of a month to six weeks in order to see if trial counsel's medical issues were resolved.

The trial court inquired if Mr. Siegel had filed a motion under section 1050, and counsel replied that he had filed only the request for transcripts and had advised the court that he could not proceed without them. The trial court replied that it had repeatedly advised counsel that it could not order transcripts and had cited case authority to that effect on two occasions. The trial court stated it had given counsel two opportunities to explain which portions in particular of the trial transcript he needed for a motion for new trial or to make any effective argument. The trial court pointed out that counsel had

---

**2** *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

before it the probation report and the transcript of the preliminary hearing. Counsel could also have conferred with the district attorney and his own client. The trial court noted that the verdicts were rendered on February 26, 2010 (three months earlier). The court stated that issues such as application of section 654 and concurrent sentencing in a three-strike case were issues that were readily apparent from the preliminary hearing transcript and the summary of facts in the probation report. The trial court ruled that there was no good cause to continue the case or to produce trial transcripts merely for the purpose of studying them to see whether or not someone can bring a motion for new trial.

***D. Motions Properly Denied***

The record shows that, after appellant's verdicts were rendered on February 26, 2010, the probation and sentencing hearing was set for March 16, 2010. Mr. Siegel represented appellant on that date, and the People filed their sentencing memorandum. Mr. Siegel requested a continuance to review the court file, and the trial court granted this request. The sentencing hearing was continued to April 14, 2010. On that date, F.M. gave a victim impact statement, and Mr. Siegel requested another continuance. The trial court issued a denial of Mr. Siegel's oral request for trial transcripts "absent a showing of specific need" on April 16, 2010. As noted, on May 26, 2010, almost six weeks later, Mr. Siegel appeared and stated he was not ready for sentencing because he had no trial transcripts.

We conclude that the facts and circumstances presented to the trial court support the trial court's denial of free transcripts. "The court must decide each case on its own facts and circumstances in determining whether the defendant has made a sufficient showing of need. [Citations.]" (*People v. Markley* (2006) 138 Cal.App.4th 230, 241.) Mr. Siegel did not show a particularized need for the transcripts, as the trial court ruled. Mr. Siegel did not express a need for transcripts in his first two appearances and then mentioned only the issues of concurrent sentencing and a *Romero* motion in connection with his need for transcripts. As the trial court stated, information was available in the probation report as to the *Romero* motion. The People's sentencing memorandum, which

was provided at the March 16 proceeding was extremely informative on the issues of consecutive versus concurrent sentencing and also on any *Romero* motion. He had also reviewed the court file. Clearly, Mr. Siegel was not "totally without information" as he claimed. Mr. Siegel could also have consulted with appellant, who had told the court that he was very intelligent and retained information well. Appellant's was a short trial of approximately four days with only a few principal witnesses. Furthermore, Mr. Siegel made no showing that Mr. Budde had provided him with no information whatsoever about the case or that Mr. Budde was completely unavailable for consultation. (See *People v. Lopez*, *supra*, 1 Cal.App.3d at p. 83.) Mr. Siegel made no indication that there were any ineffective assistance of counsel claims that would have precluded his office from proceeding with sentencing. (*Ibid*.) Moreover, the verdict had been rendered three months earlier, and a trial court's concern about delay is a wholly legitimate basis for denying a request for a full transcript, especially absent a showing of particularized need. (See *People v. Bizieff*, *supra*, 226 Cal.App.3d at p. 1704.) Under these circumstances, the trial court did not abuse its discretion in denying Mr. Siegel's request.

Moreover, appellant was not prejudiced by the denial of trial transcripts. With respect to sentencing, the record shows that the trial court carefully considered the issues of section 654 and concurrent versus consecutive sentencing as well as the issue of which three strikes sentencing formula to employ. The trial court clearly believed that appellant deserved the maximum sentence available, and the court gave reasons for its decision.[3] Mr. Siegal was not totally without information, and neither below nor on appeal does appellant say how the transcripts would have assisted him. The time for providing a defense had long since passed, and appellant has not set out any "significant trial errors or issues" on appeal. Thus any error in refusing the transcripts was harmless beyond a

---

**3** The trial court included among its reasons appellant's 1981 conviction for rape, which it had excluded from use as Evidence Code section 1108 evidence.

reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Markley*, *supra*, 138 Cal.App.4th at p. 244.)

## IV. Assistance of Counsel at Sentencing

### *A. Appellant's Argument*

Appellant contends he is entitled to per se reversal of his sentence because he suffered a complete denial of assistance of counsel during his sentencing hearing, a critical stage of trial. This was the result of his being denied trial transcripts, even though prior counsel was medically unavailable. His newly appointed counsel was unable to put the prosecution's sentencing arguments to meaningful adversarial testing or to present any evidence in mitigation. New counsel was "completely unable to participate in the sentencing proceedings to defend his client against the prosecution's case against him."

### *B. Relevant Authority*

In *United States v. Cronic* (1984) 466 U.S. 648 (*Cronic*), the United States Supreme Court held that prejudice need not be shown where the trial lost "its character as a confrontation between adversaries," (*id*. at pp. 656-657, 659), i.e., where there was a "complete denial of counsel" at a critical stage, where "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," or where even a competent attorney would have been unable to provide effective assistance under the circumstances. (*Id*. at pp. 659-660.) In *Bell v. Cone* (2002) 535 U.S. 685, the Supreme Court explained that its holding in *Cronic* was extremely narrow: "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." (*Bell*, at pp. 696-697.)

Similarly, the California Supreme Court has deemed the *Cronic* exception to be quite limited: "Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (*In re Visciotti* (1996) 14 Cal.4th 325, 353.)

### *C.* **Cronic** ***Exception Not Applicable***

In the instant case, defense counsel was not "totally absent" during appellant's sentencing proceeding. He was clearly present, and the court in no way prevented Mr. Siegel from participating. A denial of counsel requires some state action that denies or deprives a defendant of the presence of counsel. (*Bell v. Cone, supra,* 535 U.S. at pp. 695-696, fn. 3.) Therefore, there was no complete denial of counsel at a critical stage of the trial in this case.

As we have determined, the denial of trial transcripts did not prevent Mr. Siegel from participating in the sentencing proceeding. Moreover, in this three strikes case, the sentencing proceeding cannot be characterized as "a confrontation between adversaries" to the degree that the constitutional guarantee of effective assistance of counsel was violated. (*Cronic, supra,* 466 U.S. at pp. 656-657, fns. omitted.) In Cronic's case also, the high court determined that his case was not one where the circumstances made it unlikely that he could have received effective assistance of counsel. (*Id.* at p. 666.) Cronic was therefore required to make a claim of ineffective assistance of counsel by pointing to counsel's specific errors and the resulting prejudice. (*Ibid.*)

Likewise, in *In re Visciotti, supra,* 14 Cal.4th 325, the California Supreme Court determined there had not been a total breakdown of the adversarial process at the penalty phase of Visciotti's trial so as to render the verdict of death unreliable. In that case, defense counsel failed to present evidence at the penalty phase of trial that Visciotti had suffered continual abuse during his childhood. Counsel chose instead to employ "the 'family sympathy' defense." (*Id.* at p. 336.) The court determined that, despite counsel's multiple failings, Visciotti's case was "not a case in which there was a total breakdown of the adversarial process within the meaning of *United States v. Cronic, supra,* 466 U.S. 648." (*In re Visciotti*, at p. 352.) The court stated, "The failure of counsel to present the mitigating evidence petitioner has now identified, or any specific type of mitigating evidence, does not reflect such a breakdown of the adversarial process as to render the verdict presumptively unreliable. [Citations.] And, as we explained in [an earlier case],

notwithstanding the broad language in the *Cronic* opinion [citation] to the effect that when 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing,' the right to competent counsel has been denied and the result of the trial is presumptively unreliable, the actual application of *Cronic* has been much more limited. Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage. Neither factor is present here." (*Id.* at pp. 352-353; see also *In re Avena* (1996) 12 Cal.4th 694, 726-728.) Thus, Visciotti had failed to show he was constructively denied his right to counsel. He therefore had to show he had suffered prejudice in order to obtain relief. (*In re Visciotti*, *supra*, at p. 353.)

In the present case, a review of the record fails to indicate that "counsel was either totally absent or was prevented from assisting the defendant at a critical stage" of the proceedings. (*In re Visciotti*, *supra*, 14 Cal.4th at p. 353.) Therefore, to obtain relief, appellant must show that counsel's deficient performance caused him prejudice. (*Ibid.*) "[A] defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.) A reviewing court need not determine whether counsel's performance was deficient before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Id.* at p. 697.)

As indicated in the preceding section, we have concluded that no prejudice resulted from Mr. Siegel's failure to argue against appellant's three strikes sentence. Therefore, any claim of ineffective assistance fails.

## V. Enhancements Under Section 667.5, Subdivision (b)

### *A. Appellant's Argument*

Appellant contends that his prison prior enhancements (§ 667.5, subd. (b)) that derive from the same prior convictions used for the five-year serious felony enhancements (§ 667, subd. (a)(1)) must be stricken. He argues that section 667, subdivision (b) permits only the greater enhancement to be imposed.

### *B. Some Enhancements Must Be Stricken*

The information alleged in counts 1 through 5 that appellant had suffered the following three prior convictions pursuant to section 667.5, subdivision (b), which provides for a one-year sentence enhancement for each prior separate prison term: (1) case No. LA044653, a violation of section 666; (2) case No. SA004025, a violation of section 211; (3) case No. A620492, a violation of section "261(2)." The jury found true these three prior prison term allegations.

The information alleged in counts 1 through 5 that appellant had suffered pursuant to section 667, subdivision (a)(1) the following prior convictions of a serious felony: (1) case No. SA004025, a violation of section 211; (2) case No. A620492, a violation of section "261(2)." The jury found true these two allegations of a serious felony, which entail a five-year sentence enhancement for each prior conviction.

*People v. Jones* (1993) 5 Cal.4th 1142 (*Jones*) held that, "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Id.* at p. 1150.) Under *Jones*, the shorter enhancement for the prior prison term must be stricken. (*Id*. at p. 1153.)

Respondent urges that, since case Nos. SA004025 and A620492 involved other crimes, the prior prison term enhancements need not be stricken, citing *People v. Gonzales* (1993) 20 Cal.App.4th 1607 (*Gonzales*). In *Gonzales*, the court found it was faced with a wrinkle in the *Jones* rule. (*Gonzales*, at p. 1610.) One of the one-year prior prison term enhancements that the defendant challenged involved a concurrent prison

sentence imposed for two separate crimes, one of which was a serious prior felony under section 667, subdivision (a). (*Gonzales*, at p. 1610.) *Gonzales* held that a prior prison term enhancement could be imposed for that concurrent prison term, even though part of that single prison term was served for a crime for which a five-year section 667, subdivision (a)(1) enhancement was also imposed. This is because there was also a portion of that one concurrent prison term served for a crime for which a five-year enhancement was not imposed (because the crime was not a serious felony). (*Gonzales*, at p. 1610.)

The *Gonzales* holding hinged on the fact that the prior prison term in question was based partially on the same case that was the basis for the enhancement under section 667, subdivision (a), and partially on a separate, *independent* case. (*Gonzales*, *supra*, 20 Cal.App.4th at pp. 1610-1611.) The two cases for which Gonzales received a concurrent prison term had two different case numbers. (*Ibid*.) In the instant case, although the strike allegations in the information show that appellant was sentenced for three crimes in each of case Nos. SA004025 and A620492, these additional crimes were not from independent cases with different case numbers. Therefore, the *Jones* rule rather than the holding in *Gonzales* appears to apply to appellant's case. Consequently, the enhancements imposed for the prior prison terms alleged for crimes that correspond to the enhancements imposed for these same crimes alleged as serious felonies must be stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *Jones*, *supra*, 5 Cal.4th at p. 1153.)

## DISPOSITION

The judgment is modified to strike two of the three prior prison term enhancements imposed in counts 1 through 5. Appellant's sentence is therefore reduced by 10 years (six years imposed in counts 1, 3, & 4; four years imposed and stayed in counts 2 & 5). In all other respects the judgment is affirmed. The superior court is directed to amend the abstract of judgment in accordance with this opinion and to forward an amended copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ